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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Lassen)

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL RELUS VASQUEZ, Defendant and Appellant.	C060075 (Super. Ct. No. CR025277)

A jury convicted defendant Miguel Relus Vasquez of one count of violating Penal Code section 288.7, subdivision (a) (person 18 or over having unlawful sexual intercourse with a child of 10 or under). Sentenced to a prison term of 25 years to life, defendant contends the trial court committed prejudicial error in admitting evidence of defendant's prior sexual misconduct. (Evid. Code, § 1108.) Finding any error harmless, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution case

The current offense

B.V., the mother of victim J.V., was married to defendant's father from 1988 to 1999. Defendant lived with B.V. and his father off and on during that marriage. Since the divorce, defendant had not lived with B.V. and her children or had much contact with them before 2007.

In late September 2007 defendant, now around 30 years old, came from Oregon to visit B.V. and her three children, N.V., J.V., and T.V. (defendant's half siblings), at their single-wide mobile home in Susanville; defendant was supposed to stay for a couple of weeks. B.V.'s son N.V. was 17 years old; J.V. and her fraternal twin sister T.V. were 10 years old.

Defendant lived with B.V. and her family until December 5, 2007. Defendant slept in the back room with N.V.; they played video games and got along well. During the time of defendant's stay, B.V. sometimes left home overnight, entrusting the younger children to the care of defendant and N.V.

N.V. noticed that defendant and J.V. "seemed to be around each other a lot of the time." Their relationship seemed "unusual" and "weird" to him. He saw "awkward activities going on" between them. "[P]retty frequent[ly]" he would walk in and see them lying on the couch with a blanket over them. As many as five times, he saw "quick movements and then sudden stops." He talked about it with his aunt, who had the same feeling about it, but when he mentioned it to B.V. she seemed to shrug it off.

According to J.V., late one evening in December 2007 when her mother was out, she was sitting on the living room sofa in her pajamas, watching television with a quilt or blanket to stay warm.[1] Defendant joined her on the couch, then moved behind her, lay down next to her, and got under the quilt. He touched her arm, leg, and "front area" with his hand for three or four minutes.[2] After he touched her "front area" she pulled away, but he pulled her back, then started tugging on her pants. Once he had her pants down, "[h]e stuck in his front area in my front area[,]" going inside it, for about five or six minutes. He had done this before, although she did not know how many times.[3] When he finished, her front area was all wet. As she was going to her bedroom afterward, he followed her and told her not to say anything or he would hurt her.

J.V. told her friend J.D. about it a couple of weeks later.[4] J.D. told her mother, who told B.V. After that J.V. was interviewed by a sheriff's deputy and taken to Sacramento for an examination.

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[1] According to B.V., this quilt or blanket was kept in the living room and could have been used by anyone who was in there.

[2] This time he did not put his hand inside her clothing, but another time he did.

[3] Once he brought an unknown friend who watched as defendant molested her.

[4] J.V. and J.D. bought a home pregnancy test kit, but J.V. could not figure out the results and threw it out the window.

Lassen County Sheriff's Deputy Curtis Hubanks detained defendant on December 5, 2007, for reasons unrelated to the present charges. After learning that defendant had sometimes babysat children, he urged B.V. to look into it. On December 10, 2007, B.V. told him that, according to J.D.'s mother, J.V. had complained that defendant had raped her. The next day, he met with B.V., J.V., and a mental health worker at B.V.'s home, explained the protocol for a Multi-Disciplinary Interview Team (MDIT) interview about sexual abuse, and set one up for the next morning. J.V. asked Deputy Hubanks where defendant was; hearing that defendant was in jail, she asked several times fearfully whether he was going to get out.

Deputy Hubanks monitored the MDIT interview, which was conducted by district attorney's investigator Kevin Jones, with B.V., the mental health worker, and a child protective services worker in attendance. According to Deputy Hubanks, J.V. talked about the event on the couch consistently with her testimony in court; although she did not mention other events, he got the impression there had been more.

After the MDIT interview, J.V. was taken to U.C. Davis Medical Center for a forensic examination. Deputy Hubanks spoke again to defendant, who denied all contact between himself and J.V. Deputy Hubanks arrested defendant, read him his *Miranda* rights, and informed him of the new charges.[5] Defendant said he

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[5] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

would talk to Jones, who thereafter interviewed defendant on audiotape outside Deputy Hubanks's presence. The tape was played for the jury.

According to the transcript of the interview in the record, defendant denied committing any offense. J.V. often asked him to come and lie with her, rubbed against him, and acted sexually provocative toward him, but he always refused to go along. Once he woke up and found her "like moving" on top of him, so he got up and left. More than once she tried to put his hand on her private area, but he told her to "knock it off." Whenever he was on the couch, she would snuggle up against him. She had tried to kiss him on the lips and slip her tongue into his mouth. He thought she was acting out things she had seen on television. The last time she had been on the couch with him, she reached back around and tried to touch his penis. Recently, he had awakened to find her with "her panties pulled to the side rubbin' herself and then tryin' to rub on me" as she lay on top of him; he "literally jumped off the couch."

Patricia Dougherty, a sexual abuse evaluator at U.C. Davis Medical Center, examined J.V. on December 11, 2007. Dougherty found a healed defect on J.V.'s hymen and a ridge in her vaginal ring, probably caused by a penetrating trauma. The date of the injury could not be determined because such injuries heal quickly. However, the findings were consistent with the history of alleged abuse Dougherty had been given. They would also be consistent with a greater number of incidents having occurred

than J.V. originally reported. Only 5 percent of child sexual abuse cases reveal any physical findings.

Deputy Hubanks contacted J.D., who showed him the discarded pregnancy test kit. B.V. gave Deputy Hubanks the blanket or quilt mentioned by J.V.

In June, after B.V. had contacted Deputy Hubanks again, he conducted another interview with J.V. She described an incident in which defendant drove to Reno, picked up another Hispanic male whose name was not mentioned in her presence, returned to the residence with him, and raped her while the other person videotaped the event; afterward, they spoke about the other man going back to the Salem, Oregon area. J.V. became so emotional that Deputy Hubanks felt he had to stop the interview. He was never able to ascertain the third person's identity or to obtain the alleged videotape.

Criminalist Rebecca Gaxiola analyzed the blanket or quilt allegedly involved in the incident, looking for traces of semen. She found five semen stains, but could not identify the donor or donors.

The prior sexual misconduct evidence

B.V. testified that one day in 1992, when she was living with defendant's father (her then-husband), defendant, N.V., and K.V. in Oregon, she discovered defendant (then 12 or 13 years old) touching the penis of N.V. (then one or two years old). Defendant was convicted of this offense in the Oregon juvenile court.

Defense case

Defendant testified, as he had told Jones, the district attorney's investigator, that J.V. was physically and sexually aggressive toward him but he always fended her off. According to defendant, J.V. had a 13-year-old boyfriend. She was also exposed to all sorts of inappropriate behavior at home: N.V. and his friends would have sex with their girlfriends in the living room; B.V. and her boyfriends would be indiscreet; visitors would get drunk and crazy; and B.V., N.V., and others would do drugs. B.V. had a "community blanket" used by overnight guests in N.V.'s bedroom, which was considered a "party room"; N.V. also had sex there.

Defendant dated J.D.'s mother and lived at her home during November 2007. He saw J.V. sneaking boys in and out of the house. He knew J.V. disapproved of his relationship with J.D.'s mother.

Defendant did not have friends in Reno.

Shortly after arriving in Susanville in September 2007, defendant felt extreme discomfort in the groin area, which he learned was the result of two sexually transmitted diseases. Because he was in pain and did not wish to transmit the diseases, he avoided all sexual contact at this time.

As to the alleged prior misconduct, defendant testified that B.V. and his father beat him until he agreed to admit to the police that he had touched N.V.'s penis.[6]

Defendant admitted felony convictions in Oregon in 2001 and 2003.

DISCUSSION

Defendant contends the trial court prejudicially abused its discretion by admitting the evidence of his 1992 Oregon offense under Evidence Code section 1108. We agree the evidence should not have been admitted, but find the error harmless for three reasons: both parties urged the jury to give it little, if any, weight in deliberations; the trial court correctly instructed the jury as to its significance, if any; and the case against defendant apart from the prior offense was overwhelming.

Background

The People filed a written motion in limine to admit the Oregon juvenile offense under Evidence Code section 1108. To show why this offense was admissible, they alleged only that it proved defendant was a "sexual deviant."

Defendant opposed the motion, arguing that the evidence had no probative value as to the present offense and was therefore unduly prejudicial.

After counsel submitted the matter in limine on the briefs, the trial court summarily ruled the evidence admissible.

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[6] On rebuttal, B.V. denied this allegation.

Analysis

In enacting Evidence Code section 1108, the Legislature intended the trier of fact to "be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility." (*People v. Falsetta* (1999) 21 Cal.4th 903, 911.) Therefore, evidence of prior sexual misconduct is admissible to show propensity without regard to the limitations of Evidence Code section 1101. (*People v. Branch* (2001) 91 Cal.App.4th 274, 281 (*Branch*).)

However, Evidence Code section 1108 does not automatically allow the admission of all prior sexual misconduct evidence. Such evidence must still pass the screening test of Evidence Code section 352. Thus, if it is minimally probative as to the present offense but highly likely to inflame the jury emotionally against the defendant, it should be excluded. (*People v. Harris* (1998) 60 Cal.App.4th 727, 736-741 (*Harris*).)

Defendant asserts that the evidence in question should have been excluded because it was dissimilar to the present offense, extremely inflammatory, lacking in probative value, and stale. (Cf. *Harris*, *supra*, 60 Cal.App.4th at pp. 738-740.) While we do not think the prior misconduct was particularly inflammatory compared to the present offense, defendant's other points are well-taken.

First, the former offense (a barely pubescent boy touching an infant's penis) bore almost no resemblance to the present offense (a 30-year-old man essentially raping a 10-year-old girl).

Second, because the offenses were so dissimilar, the former offense had minimal probative value as to the present offense. The fact that a child inappropriately touched a male infant's genitals has very little tendency in reason to show that the child, now grown up, would be inclined to force himself on a 10-year-old female. Contrary to the People's claim below, the catchall term "sexual deviant" does not overcome this logical gap.

Third, although there is no absolute cutoff point beyond which a prior offense becomes stale or remote (*Branch*, *supra*, 91 Cal.App.4th at p. 284), the facts that the prior offense occurred 16 years before the present offense, was not followed by any intervening sexual offense, and did not resemble the present offense militated against its admissibility on this ground (see *Harris*, *supra*, 60 Cal.App.4th at p. 739 [23 years without intervening sexual misconduct]). The cases cited by the People for the contrary proposition, in which prior offenses were properly admitted despite their age because they were strongly similar to the current offenses, are therefore inapposite. (*People v. Pierce* (2002) 104 Cal.App.4th 893, 900; *Branch*, *supra*, 91 Cal.App.4th at p. 285; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395; *People v. Soto* (1998) 64 Cal.App.4th 966, 974, 978, 991-992.)

For all the above reasons, the trial court should have excluded the prior-acts evidence here under Evidence Code section 352. Nevertheless, the court's error was harmless.

First, both counsel told the jury in closing argument that the prior offense merited little, if any, weight in deliberations. Near the end of his first closing argument, after he had summarized all the other evidence, the prosecutor said: "Now I want to talk for just a second about prior convictions. It's important that we understand what the use is of prior convictions. In this case there is a prior conviction from 1992 . . . . The legitimate use of that is to suggest the possibility and you may conclude this or you may not, that if the defendant is good for doing something like this in the past, touching on kids, is he for good [*sic*] for doing it on this occasion? That's a dangerous proposition. Generally speaking the law says[,] look[,] you can't take what a person has done in the past and use it to establish what they did on this occasion. Who knows what happened on this occasion? Sex cases are difficult. This sex case the law recognizes and we think based on science people who have done this kind of thing in the past -- I'm not saying that he did -- pedophile behavior, if you have done it in the past, maybe you have a character for that and maybe that's why you did this one. It's propensity evidence. It is entirely your call, what weight to give that older case."

Defense counsel argued: "I want to touch real quickly on this conviction out of Oregon. That's fifteen years old. Defendant says it was a forced admission. Take it for what it is worth. I don't think you should give it much weight based

upon his age and it's [*sic*] significan[ce] with regard to what occurred in the events involving this case."

In the prosecutor's rebuttal, he did not mention the prior-acts evidence.

The trial court correctly instructed the jury pursuant to CALCRIM No. 1191 as to the prior (cf. *People v. Schnabel* (2007) 150 Cal.App.4th 83, 87):

"The People presented evidence that the defendant committed the crime of sexual abuse in the third degree in violation of the Oregon Revised Statutes, section 163.415. This crime is defined for you in these instructions.

"A person commits this crime if he or she subjects another person to sexual contact and the victim is incapable of consenting by reason of him being under the age of 18. Sexual contact is defined as 'any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or intimate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party.'

"You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the crime of sex abuse in the third degree. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

"If the People have not met this burden of proof, you must disregard this evidence entirely.

"If you decide that the defendant committed sex abuse in the third degree, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit sexual intercourse with a child ten years of age or younger, as charged here. If you conclude that the defendant committed sex abuse in the third degree, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the charged crime. The People must still prove each element of the charge beyond a reasonable doubt."

Given the trial court's instruction and the arguments of counsel, there is no reasonable probability that the jury gave the prior-acts evidence more weight than it deserved.

In any event, the evidence apart from the prior offense overwhelmingly proved defendant's guilt. The jury could reasonably have found J.V.'s testimony more credible than that of defendant, a twice-convicted adult felon. Defendant asked the jury to believe the unlikely story that he continued to live for months without complaint in a household where a 10-year-old sexual predator was constantly assailing his virtue (not to mention all of the other inappropriate behavior allegedly engaged in on the premises by the other residents and their acquaintances). Moreover, the physical evidence showed that J.V. had incurred injuries consistent with her account, and defendant offered no evidence to explain those injuries in any

other way. In light of all of the evidence pointing to defendant's guilt, the trial court's error in admitting the prior-acts evidence was harmless by any standard.

DISPOSITION

The judgment is affirmed.

RAYE, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.